UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANA K. LANDRY, individually, and as Next of kin and personal representative of Matthew Conrad Nelson (deceased)	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CASE NO. 4:17-cv-370
	§	
TEXAS DEPT. OF CRIMINAL JUSTICE; DONNA LANE, STEVEN BEUSCH CORY PEACH; MARY SQUYRES, STEPHANIE CRUZ, KELLI TAYLOR, PILAR LABORDE-LAHOZ, CONRAD GIBBY, SUNIL ATHAVALE, SHARON LAMBI, each in their individual Capacity; And HARRIS COUNTY;	§	
	§	
Defendants.	§	

DEFENDANT, CONRAD GIBBY, M.D.'S ORIGINAL ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

COMES NOW, CONRAD GIBBY, M.D., a Defendant in the above numbered and entitled cause and files this Answer to Plaintiff's Second Amended Complaint. In response, thereto and in support hereof, Defendant would respectfully show the Court the following:

I.
ANSWER TO COMPLAINT

1. Defendant responds to the allegations in the Complaint in the order in which they

appear; to the extent not expressly admitted, Defendant denies each and every allegation lodged in the Complaint as well as Plaintiffs' characterizations of each factual allegation.

Introduction

2. As to Paragraphs 1-9 of the Complaint, Defendant admits he prescribed Tramadol; Defendant is unable to admit or deny the remainder of the averments/allegations as they pertain to other parties and/or alleged facts of which Defendant has no personal knowledge. Therefore, with the exception of those facts or allegations hereinabove admitted, as Defendant is without sufficient knowledge or information to form a belief as to the truth of Plaintiff's allegations, Defendant, on denies the remainder of each and every allegation contained therein.

Jurisdiction and Venue

3. As to Paragraphs 10-12 of the Complaint, although Defendant denies that the claims against him have any merit, Defendant admits venue is appropriate in the United States District Court for the Southern District of Texas, Houston Division as to Defendant and that this Court has jurisdiction as to Defendant.

Parties

4. As to Paragraphs 13-29 of the Complaint, Defendant admits he is a physician who was and is licensed to practice medicine in Texas; Defendant is unable to admit or deny the averments/allegations as they are not within Defendant's personal knowledge.

Jury Demand

5. As to Paragraph 30, Defendant admits trial by jury is appropriate with respect to

the claims against Defendant, although the claims may be disposed of by the Court on proper motion before a jury trial takes place.

Statement of Facts

6. As to Paragraphs 31-54 of the Complaint and each sub-part, Defendant admits he prescribed Tramadol, specifically denies any continuing physician-patient relationship with Nelson after the 30-day prescription for Tramadol was completed by December 15, 2017, denies providing treatment for a suicide attempt on March 13, 2015 or approving that he be sent back to the general prison population, and is unable to admit or deny the remaining averments/allegations as Defendant has no personal knowledge of them.

Causes of Action

Cause of action #1 (violations of the ADA)

7. As to Paragraphs 55-63 of the Complaint and each sub-part, Defendant denies each allegation and/or averment contained therein as to Defendant; Defendant is unable to admit or deny the averments/allegations that pertain to other parties as Defendant has no personal knowledge of them.

Cause of action #2 (8th and 14th Amendment violations; §1983)

8. As to Paragraphs 64-70 of the Complaint and each sub-part, Defendant denies each allegation and/or averment contained therein as to Defendant; Defendant is unable to admit

or deny the averments/allegations pertaining to other parties as Defendant has no personal knowledge of them.

Cause of action #3 (municipal liability)

9. As to Paragraphs 71-81 of the Complaint and each sub-part, to the extent these allegations are meant to apply to Defendant, Defendant denies each allegation and/or averment contained therein; Defendant is unable to admit or deny the averments/allegations that pertain to other parties as Defendant has no personal knowledge of them.

Cause of action #4 (medical malpractice)

10. As to Paragraph 82 of the Complaint and its sub-parts, Defendant admits he is a licensed physician who owed a duty of ordinary care to his patient. Defendant denies being liable or responsible for the acts or omissions of any other person and denies all other allegations/averments contained therein as they pertain to Defendant. Defendant is unable to admit or deny the averments/allegations pertaining to other parties and/or allegations as Defendant has no personal knowledge of them.

11. As to Paragraphs 83-86 of the Complaint, Defendant denies each allegation and/or averment contained therein as they pertain to Defendant; Defendant is unable to admit or deny the remaining averments/allegations as Defendant has no personal knowledge of them.

Cause of action #5 (wrongful death)

12. As to Paragraphs 87-91 of the Complaint, to the extent these allegations are meant to apply to Defendant, Defendant denies any act or omission on his part proximately caused the

death; Defendant is unable to admit or deny the remaining averments/allegations as Defendant has no personal knowledge of them.

Cause of action #6 (survival)

13. As to Paragraphs 92-97 of the Complaint, Defendant denies any act or omission on his part proximately caused any injuries or damages to the decedent and therefore denies that Nelson had any claims against Defendant at or before his death.

Immunity

14. As to Paragraphs 98-101 of the Complaint, to the extent that Plaintiff alleges that Defendant was an employee or agent of any governmental entity, Defendant is entitled to and does hereby assert his entitlement to sovereign, qualified and/or governmental immunity.

Damages

15. As to Paragraph 102 of the Complaint and its sub-parts, Defendant denies any act or omission on his part proximately caused any damages to the Plaintiff or decedent and therefore denies that Landry is entitled to recover any damages from Defendant.

Plaintiff's Request for Relief

16. As to Paragraph 103 of the Complaint and its sub-parts, Defendant denies any act or omission on his part proximately caused any damages to the Plaintiff or decedent and denies that any of the listed damages are appropriate as to Defendant or that Plaintiff is entitled to any other relief.

II.
Affirmative Defenses

1. Defendant asserts that Plaintiff has failed to provide the statutory notice required by Chapter 74.051 of the Texas Civil Practice and Remedies Code and the authorization for release of protected health information required by Chapter 74.052 of the Civil Practice and Remedies Code and Defendant affirmatively asserts all rights, relief and entitlements for Plaintiff having failed to provide appropriate notice.

2. Defendant asserts that Plaintiff's claims against him are barred by the Statute of Limitations contained within Chapter 74.251 of the Texas Civil Practice and Remedies Code.

3. Defendant specifically denies that singularly, or in concert with any co-Defendant, he was negligent, grossly negligent, breached any duty to Plaintiff or deprived Plaintiff of any civil or constitutional right.

4. Defendant specifically denies that any act or omission on his part proximately caused any of the Plaintiff's alleged injuries or damages.

5. Defendant alternatively pleads Plaintiff's claimed injuries or damages were due to a pre-existing or subsequently occurring condition over which this Defendant had no control.

6. Defendant affirmatively asserts the limitations on civil liability pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code and affirmatively asserts all rights, relief and entitlements related thereto.

7. Defendant further affirmatively asserts any and all rights, relief and entitlements given to health care liability claim defendants in Chapter 74 of the Texas Civil Practice and Remedies Code including, but not limited to Chapter 74.005 conflict of laws provision, Chapter

74.301, *et. seq.*, pertaining to liability limits, Chapter 74.351, *et. seq.*, pertaining to procedural provisions and Chapter 74.503, *et. seq.*, pertaining to periodic payments.

8. Defendant asserts his right to contribution and/or credit pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code.

9. Defendant denies the applicability of joint and several liability in this case.

10. Defendant reserves and relies upon all rights, protections, and options allowed under the doctrine of comparative causation as adopted by the Texas Supreme Court, and pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code.

11. Defendant affirmatively invokes Chapter 41 of the Texas Civil Practice and Remedies Code including, but without limitation, §§41.003, 41.004, 41.006, 41.008(a) & (b), 41.010, 41.011, 41.012, as it may bear upon current and/or future allegations of gross negligence and exemplary damage recovery. Alternatively, this Defendant asserts any claim for punitive or exemplary damages would violate provisions of the Texas and United States Constitutions.

12. Defendant affirmatively alleges that the injuries of Plaintiff, if any, were proximately caused, in whole or in part, by his own negligent or intentional conduct.

13. Defendant further asserts that the sole proximate cause of the injuries, damages, or disabilities, if any, complained of by the Plaintiff herein were acts, circumstances, conditions or conduct over which this Defendant had no control.

14. Defendant specifically gives notice that he intends to rely upon any other affirmative defenses that may become available, or apparent, during the development of

discovery in this case, and thereby reserves the right to amend his Answer to assert such appropriate defenses.

15. Defendant affirmatively pleads the provisions of §§304.003(c) and 304.1045 of the Texas Finance Code prohibiting recovery of prejudgment interest on any award of future damages.

16. With respect to claims for exemplary/punitive damages, Defendant specifically invokes his right to a Bifurcated Trial pursuant to the provisions of §41.009 of the Texas Civil Practice and Remedies Code and specifically moves for the same herein.

17. Defendant asserts Plaintiff may not recover any amounts for past medical treatment greater than the actual amount paid or incurred by Plaintiff or by a third party on behalf of Plaintiff for such treatment. *See* Tex. Civ. Prac. & Rem. Code §41.0105; *Haygood v De Escabedo,* 356 SW 3d 390 (Tex. 2011). Further, to the extent such alleged damages arise from the treatment paid for by Medicaid, such amounts are also not recoverable as a matter of law.

18. Defendant affirmatively pleads that Plaintiff's pleadings of punitive and/or exemplary damages are violative of the Due Process Clauses of the Fifth and Fourteenth Amendments inasmuch as punitive and/or exemplary damages can be assessed:

A. in an amount left to the discretion of the jury and Judge;

B. in assessing such sums the decision of the jury need only be based on a vote of ten jurors and does not require a unanimous verdict;

C. in assessing such penalty or exemplary awards Plaintiff need only prove the theory of gross negligence on a preponderance of the evidence standard and not on a "beyond a reasonable doubt" standard as should be required in assessing a punishment award;

D. further, a Defendant who is subject to the award does not have the right to refuse to testify against himself but must in fact take the stand and/or give deposition testimony or subject himself to the consequences of a default judgment;

E. the assessment of such a punishment and/or exemplary award is not based upon a clearly defined statutory enactment setting forth a specific mens rea requirement and/or other prerequisites of a criminal fine and in effect allows the assessment of such awards even though there are no specific standards, limits or other statutory requirements set forth which define the mens rea and scope and limit of such awards. Therefore, the awards are unduly vague and do not meet the requirements of due process;

F. in essence, the Defendant herein is subjected to all the hazards and risks of what amounts to a fine, and in fact such awards often exceed normal criminal fines, but the Defendant receives none of the basic rights accorded to a criminal defendant when being subjected to possible criminal penalties.

19. Further, Defendant affirmatively pleads that the assessment and award of punitive and/or exemplary damages violates of the Eighth Amendment of the United States Constitution as it is applied through the States through the Fourteenth Amendment of the United States Constitution in that such awards potentially constitute an excessive fine imposed without the protection of fundamental due process. Accordingly, Defendant invokes his rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and respectfully requests that this Court disallow the award of punitive and/or exemplary damages inasmuch as an award in this case would violate Defendant's United States Constitutional rights.

20. Plaintiff has failed to state a claim upon which relief can be granted against him.

21. Plaintiff has not been injured by any act of this Defendant and liability against this Defendant cannot be predicated on the provisions of 42 U.S.C. §1983 or any other statute.

22. To the extent Plaintiff claims Defendant was acting as an agent or employee of any unit of state, county, or local government or any subdivision thereof, Defendant is entitled to

immunity under 42 U.S.C. §1983 and/or the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code §101.001, *et. seq*.

23. To the extent Plaintiff claims that Defendant was acting as an agent or employee of any unit of state, county, or local government or any subdivision thereof, Plaintiff failed to give the timely notice required by the Tort Claims Act, Tex. Civ. Prac. & Rem. Code §101.101, *et. seq*.

24. To the extent Plaintiff claims that Defendant was acting as an agent or employee of any unit of state, county, or local government or any subdivision thereof, liability is limited in accordance with the Tort Claims Act, Tex. Civ. Prac. & Rem. Code §101.023.

25. To the extent Plaintiff claims that Defendant was acting as an agent or employee of any unit of state, county, or local government or any subdivision thereof, punitive damages are prohibited. Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code §101.024.

26. Defendant cannot be held vicariously liable for any alleged violation of Plaintiff s constitutional rights by another individual under the Civil Rights statutes.

III.
REQUEST FOR JURY TRIAL

COMES NOW CONRAD GIBBY, M.D., a Defendant in the above-entitled and numbered cause of action, and requests that a jury trial be held on said cause.

IV.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, CONRAD GIBBY, M.D., respectfully prays that upon final Judgment in this cause, Plaintiff take nothing against him by reason of this lawsuit, that he recover his costs of Court, and for such other and further relief, both general and special, to which Defendant is justly entitled.

Respectfully submitted,

UZICK & ONCKEN, P.C.

By: ____________________________

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing pleading has been served on all counsel of record on this the 26th day of April, 2017 via ECF electronic notice herein in compliance with Rule 5 of the Federal Rules of Civil Procedure and paragraph 9 of the Southern District of Texas's Administrative Procedures for Electronic Filing in Civil and Criminal Cases by notice of Electronic Filing and on Plaintiff at the address given in his Original Complaint in accordance with the Federal Rules of Civil Procedure.

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